the plaintiffs in that action because they were suing in the right of Alton and were seeking to enforce a claim which Alton allegedly had against B. & O. (pp. 41a-42a; 228 F. 2d 563, 565—Appendix to Petition, p. 41).

In his opinion in that case Murphy, D.J., said (123 F. Supp. 44, 46, Appendix to Petition, p. 20):

> "* * * Plaintiffs apparently sue in the capacity of creditors in aid of execution on their debtor's claim against defendant: viz, the Alton's claim for damages due to the alleged mismanagement during the period of defendant's control.
>
> * * * * *
>
> "* * * Defendant's present motion is based entirely on the ground of time limitations and, for the purposes of deciding this motion, the factual allegations of the complaint must be taken as true."

It is the thesis of the plaintiff in the instant suit that the plaintiff in the *Rieser* action selected a remedy which did not lie, namely that the diversion of assets by a wholly owned subsidiary to its parent does not constitute a wrong to the subsidiary but to its creditors and that therefore a derivative action in the right of the subsidiary did not lie.

The instant suit is a direct action and is founded on the basic principle of law that if by the diversion of assets to the parent by the wholly owned subsidiary, the subsidiary is rendered insolvent, the injury is to the creditors of the subsidiary and not to the subsidiary itself. And in such a situation the injury to the creditors is direct—and the creditors may proceed directly against the fraudulent grantee for an accounting for the property fraudulently transferred to it.

And it is the position of the plaintiff that the judgments in the ill advised derivative action are no bar to the present action.

The Facts

The facts as alleged in the two causes of action are in many respects alike. The difference between the two actions is not in the facts themselves, but in the correlation of those facts to the rights and interests of the respective parties.

Each complaint sets forth these facts.

B. & O., on January 7th, 1931, acquired all of the issued and outstanding capital stock of Alton (pp. 3a; 30a);

Between July 18th, 1931 and May 31st, 1947, Alton was the obligor upon $45,350,000. principal amount of The Chicago and Alton Railroad Company 3% Refunding Mortgage Bonds (Alton Bonds) (pp. 2a-3a; 29a);

The plaintiffs in the *Rieser* action and the plaintiff in the instant action are holders of Alton Bonds (pp. 2a-3a; 30a) and the respective actions were brought by them in behalf of themselves and other holders of Alton Bonds (pp. 28a-29a; 2a);

In January 1931, when B. & O. acquired the issued and outstanding stock of Alton, Alton was an integrated railroad with an established good will; it had profitable traffic interchange agreements and arrangements with certain railroads; it maintained profitable business relations with suppliers, firms and corporations who in turn favored Alton with substantial traffic; it had its own solicitation department which concentrated on the promotion of business over its lines and it had a substantial complement of rolling stock and equipment (pp. 3a; 30a-31a);

On November 25th, 1942, Alton filed a petition for reorganization under Section 77 of the Bankruptcy Act, in the United States District Court for the Northern District of Illinois, Eastern Division (pp. 6a; 35a); and

In the reorganization proceeding, the order confirming the plan of reorganization specifically reserved and preserved the rights of owners and holders of Alton Bonds to assert any claim against the defendant. That order was dated May 31st, 1947 (pp. 7a; 37a).

The insolvency which caused the filing of the petition was brought about by certain acts which were committed between January 1931 and November 1942. The difference between the complaints in the two causes of action is in the allegations setting forth the acts and in relating the acts to the injuries and to the rights and remedies of the parties.

The Rieser Complaint (pp. 28a-41a)

That complaint set forth two causes of action. In the first cause, the plaintiff charged that "in violation of its fiduciary duties * * * and using its complete domination and control of Alton * * * the defendant * * * caused loss, damage and injury to Alton, to the holders of Alton Bonds and to the property and assets (of Alton)" (p. 37a).

The complaint then proceeds to enumerate the various wrongs committed by B. & O. against Alton: "The defendant caused traffic * * * to be diverted to defendant's lines (p. 31a); caused Alton to interchange traffic with lines chosen by defendant (p. 31a); the defendant * * * eliminated the traffic solicitation department of Alton * * * to insure preferential treatment * * * at the expense of Alton (whereby) * * * Alton and the holders of Alton

Bonds * * * were damaged in the amount of about $17,500,000 (pp. 31a-32a); defendant used largely its own rolling stock to meet the requirements of Alton and * * * neglected to keep Alton's rolling stock * * * in proper order and repair * * * and permitted said rolling stock to rust and rot * * * [by reason of which] Alton suffered the loss of capital assets * * * in an amount not less than $19,500,000; and of net income in amount of not less than $5,000,000. (p. 32a); defendant used Alton's tracks and equipment * * * without paying Alton the reasonable value [and] * * * caused repairs to be made to its own rolling stock through the facilities of Alton * * * without paying the reasonable value of said use * * * in the amount of about $1,000,000. (pp. 32a-33a); defendant caused diversion of purchases * * * to potential shippers over defendant's lines and thus severely damaged Alton's business relations * * * in the amount of about $3,000,000. (p. 33a); the defendant caused Alton to negotiate new contracts * * * containing terms less favorable to Alton and more favorable to defendant, to the unjust enrichment of the defendant and damage to Alton and holders of Alton Bonds * * * in the amount of about $1,000,000. (p. 33a); during 1940 and 1941, Alton suffered an aggregate net loss of about $2,000,000. [and]; * * * defendant filed federal tax returns * * * upon a consolidated basis [and] if defendant had not forced Alton to include the results of its operations in consolidated returns * * * Alton * * * would have deducted all or most of its losses during the years 1940 and 1941 from its net taxable income for 1942 and 1943 and thereby have saved Federal taxes * * * in an amount unknown to plaintiffs (pp. 33a-34a); [and] the defendant discriminated unfairly against Alton in dividing revenues on traffic interchanged between them" (p. 34a).

In the second cause, the plaintiffs repeated the allegations of the first cause of action and then alleged that "the acts and transactions complained of also constitute a fraud practiced by the defendant upon Alton and the holders of Alton Bonds * * *" (p. 39a).

The complaint in the *Riesey* suit made B. & O. the wrongdoer and Alton the victim. It is the defendant who committed all the acts.

The charge was that B. & O., the sole stockholder, seized control of Alton and compelled Alton against its, Alton's will, to perform and commit the various acts charged therein. It charged B. & O. not only with the appropriation of corporate opportunities and other valuable rights and property, but it charged B. & O. with waste and mismanagement. Alton owned "in excess of 14,000 freight cars, locomotive and passenger cars, as well as incidental equipment, substantially all of which were in good condition and repair * * * (p. 31a) (and B. & O.) neglected to keep Alton's rolling stock, including engines, passenger cars and freight cars in proper order and repair as required by good railroad practice; instead defendant stored such rolling stock on side tracks in the open, subject to the action of the elements and permitted said rolling stock to rust and rot and otherwise deteriorate, and failed to make replacements so that most of it became useless and valueless" (p. 32a).

B. & O. was asked not only to account for income and property diverted to itself, but also to compensate for loss of assets and for income which was lost because of this waste and mismanagement.

Plaintiffs in that case assumed that the acts set forth constituted a wrong against Alton and gave Alton a cause of action against B. & O. and the plaintiffs sought to enforce that cause of action in the right of Alton.

The Koblitz Complaint (pp. 2a-9a)

The Koblitz complaint presents the acts which caused the insolvency and brought about the reorganization proceeding in their true perspective, in a context which realistically sets forth the wrongs and wrongdoers and with proper allegations of facts spells out a direct action against B. & O.

The gist of that complaint is as follows (pp. 3a-4a):

> "SIXTH: That upon acquiring the stock of Alton, as aforesaid, the defendant and Alton entered upon a design, scheme and plan to defraud the creditors of Alton, including plaintiff and other holders of Alton Bonds.
>
> "SEVENTH: Pursuant to said design, plan and scheme, Alton elected as officers and directors of Alton, servants and employees of the defendant and Alton became a part of an instrumentality and agency of the defendant's railroad system.
>
> "EIGHTH: That in furtherance of the plan, scheme and design as aforesaid, the defendant and Alton committed and performed the following acts and deeds."

Then follows a recital of various acts by which corporate opportunities and other valuable rights and property were conveyed and transferred to B. & O. by Alton in fraud of Alton's creditors.

There is no mention of the equipment and rolling stock which was stored "on side tracks in the open"; and permitted "to rust and rot and otherwise deteriorate"; there is no mention of "the loss of capital assets • • • in an amount not less than $19,500,000"; there is no charge of waste or mismanagement.

In fact, there was no mismanagement of Alton. Alton was very well managed, but in the interest of B. & O. its sole stockholder, and to the injury and damage of Alton's creditors, the bondholders.

If Alton had had no creditors, there would have been no grounds for complaint for no one would have been injured.

But Alton did have creditors—bondholders—and those acts injured those bondholders.

In the *Koblitz* action, the wrongdoers are B. & O. and Alton and the injured are the holders of Alton Bonds. There is no charge that B. & O. injured Alton.

The plaintiff charges that B. & O. and Alton entered into a conspiracy to defraud Alton's creditors and the acts complained of were committed pursuant to that conspiracy.

The suit is brought not for the recovery for waste or mismanagement, but for an accounting for corporate opportunities and other valuable rights and property fraudulently conveyed to B. & O., by its wholly owned subsidiary; the fraudulent grantee is asked to account for property fraudulently conveyed to it.

The Judgments in the Rieser Action (pp. 41a, 44a).

The judgments dismissing the complaint in the *Rieser* action were entered upon the defendant's motion for summary judgment on the ground that the alleged action by Alton against B. & O., was barred by the New York Statute of Limitations (Exhibit B, 41a, Exhibit D, 44a) and hence not available to the plaintiffs.

The sufficiency of the complaint was not challenged or considered. The court was not asked to and did not con-

sider whether the facts alleged did in fact spell out a cause of action by Alton against its sole stockholder, B. & O.

There was no trial of the issues—there was no adjudication of the merits. The case was dismissed upon defendant's plea in bar—not on an adjudication of the merits.

The *Rieser* complaint alleged that B. & O. had committed certain wrongs against Alton and that the plaintiffs as judgment-creditors of Alton, were entitled to enforce Alton's claim against B. & O. *And the Court determined merely that if Alton had a cause of action against B. & O., that cause of action was barred by the statute of limitations, and was therefore not available to the plaintiffs.*

Nothing else was considered.

Nothing else was determined.

Reasons for Granting the Writ

I. The decision of the United States Court of Appeals is in direct conflict with the decision of this Court in *Southern Pacific Company* v. *Bogert*, 250 U. S. 483.

The plaintiff in the *Rieser* action chose a derivative action which did not lie and now the lower courts say that the choice of a derivative action which did not lie is a bar to a direct action to compel B. & O. to account for property fraudulently conveyed to it.

Alton had no cause of action against B. & O. Between January 1931 and November 1942, when the various acts which the Rieser complaint charged were wrongs committed by B. & O. against Alton, B. & O. was the sole stockholder of Alton.

A suit by Alton against B. & O. would have been in effect a suit by B. & O. against itself because B. & O. is the sole stockholder and it would be suing itself to recover from itself for wrongs allegedly committed by itself.

The corporation belongs to its stockholders and with respect to acts performed with the unanimous consent of its stockholders, neither the corporation nor its stockholders may sue.

Stockholders by their unanimous consent, may do as they choose with the corporate affairs and assets, provided, however, that what they do is not prohibited by statute, does not contravene public policy and does not affect the rights of creditors.

See *Old Dominion Copper Co.* v. *Lewisohn*, 210 U. S. 206; *McCandless* v. *Furland*, 296 U. S. 140, 162; *Manson* v. *Curtis*, 223 N. Y. 313 (1918); *Clark* v. *Dodge*, 269 N. Y. 410; *Sheldon Hat Blocking Co.* v. *Eickemeyer Hat Blocking Machine Co.*, 90 N. Y. 607; *General Hatters Supply Co.* v. *Hartman*, 148 N. Y. S. 2d 90 (N. Y. Sup. Ct. 1955. Not officially reported.)

The choice of a remedy which did not exist, is no bar to the present action.

The leading case of plaintiffs in search of a remedy is *Southern Pacific Company* v. *Bogert*, 250 U. S. 483.

The action was brought in 1913 to impress a trust upon stock held by Southern Pacific. The transactions which were the basis of the action took place in 1887. Between 1887 and 1913, the plaintiffs pursued suit after suit in search of a proper remedy.

The suit immediately preceding this action was brought in the Supreme Court of the State of New York, New York County; *MacArdell* v. *Olcott*, 189 N. Y. 368 (1907).

The complaint in that case set forth a "'stockholders' action of and for the benefit of the corporation" (379).

The trial court dismissed the complaint for failure to make out a cause of action. The Appellate Division (104 App. Div. 263; 93 N. Y. S. 799) affirmed because the action was "not to impress a lien upon the stock of the Houston Company, which was subsequently acquired by the Southern Pacific Company" (93 N. Y. S. 804).

In the Court of Appeals, plaintiffs abandoned the cause of action alleged. They conceded that no "stockholders' action" existed.

Without amendment of the complaint which had been dismissed and adopting the suggestion of the Appellate Division, the plaintiff proceeded upon a theory of trust. With respect to that, the Court of Appeals said at page 383:

> "In this contention the appellants have abandoned their complaint of fraud and confusion and conspiracy amongst the defendants against the corporation, whereby the latter has been stripped of its property, and inferentially they assume the validity of these steps and transfers as against the corporation because they insist upon sharing with the Southern Pacific Company the advantages which it has secured thereby. In their brief they specifically affirm the validity and binding effect of the judgment of foreclosure and sale and do not dispute that a good and valid title to property was obtained thereunder. In their own words 'The plaintiffs seek—nothing more is necessary for them upon the present appeal—to impress upon the interest of the Southern Pacific Company in the shares of the new company and in the lands a trust obligation to account for profits to its associate stockholders.' "

The Court of Appeals, however, affirmed the judgment of the lower court, because it had "no authority which would permit it to utilize facts introduced under a complaint to sustain one well-defined cause of action as a basis upon appeal for an entirely distinct and different cause of action" (p. 384).

In the *Bogert* case, Southern Pacific Company pleaded the judgment in the *MacArdell* case was a bar to that action. In overruling that contention, Brandeis, J., said at page 490:

> "The minority stockholders sought, when presenting the case in the Court of Appeals of New York (MacArdell v. Alcott, 189 N. Y. 368-372-373) to have declared the trust which was later decreed in this suit; but that Court refused to consider the contention for the reason that this claim to relief was based upon a theory 'widely at variance' with that upon which that action was commenced and tried. Because of such divergence the earlier decrees do not operate as res judicata."

See also *Troxell* v. *D. L. & W. Railroad Co.*, 227 U. S. 434; *Frank Shepard Co.* v. *Zachary P. Taylor Pub. Co.*, 198 App. Div. 638; mod. in other respects in 234 N. Y. 465; *Henry* v. *Hegrington*, 193 N. Y. 218; *Cohen* v. *City Company of New York*, 283 N. Y. 112.

II. Alton Bondholders as part of their distributive share in the reorganization of Alton pursuant to Section 77 of the Bankruptcy Act were granted the right to assert whatever claim they as bondholders had against B. & O.

Recovery has been denied Alton Bondholders because in the first action they chose a remedy which did not lie.

The holders of Alton bonds are thus deprived of rights awarded to them in the reorganization proceedings of Alton.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

NATHAN B. KOGAN,
of New York, N. Y.
Counsel for Petitioner.

DAVID M. PALLEY,
of New York, N. Y.
of Counsel.

Opinion of United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 180—October Term, 1958.

(Argued March 3, 1959 Decided April 28, 1959.)

Docket No. 25331

MILTON S. KOBLITZ,

Plaintiff-Appellant.

AGAINST

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendant-Appellee.

Before:

MEDINA and HINCKS, Circuit Judges, and MATHES, District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, *Judge.*

Plaintiff appeals from a summary judgment granted against him in an action on behalf of himself and other bondholders of Alton Railroad Company, on the ground

* United States District Judge for the Southern District of California, sitting by designation.

that plaintiff was bound by a prior judgment. (Opinion below is reported at 164 F. Supp. 367. Affirmed.

DAVID M. PALLEY, New York, N. Y. (Nathan B. Kogan and Louis Boehm, New York, N. Y., on the brief), *for plaintiff-appellant.*

JOHN D. CALHOUN, New York, N. Y. (Cravath, Swaine & Moore and John F. Hunt, Jr., New York, N. Y., on the brief), *for defendant-appellee.*

PER CURIAM:

We affirm on the opinion of Judge Bryan, reported at 164 F. Supp. 367. In addition to the estoppel of the former judgment we find that the basic point now argued as to whether the source of appellant's claim is derivative or direct, was determined in the appeal to this Court from the adverse judgment in the prior action. *Rieser* v. *Baltimore & Ohio R. R.*, 2 Cir., 1955, 228 F. 2d 563. Thus appellant is bound not only by a direct but also by a collateral estoppel.

Affirmed.

Opinion of United States District Court in *Rieser* Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M'filmed

Civ. 75-223

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Plaintiffs,

— AND —

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Plaintiffs,

AGAINST

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant.

APPEARANCES:

LOUIS BOEHM and NATHAN B. KOGAN, Co-General Counsel for the Plaintiffs (Louis Boehm, Victor House, Spencer Pinkham, of Counsel).

Louis H. O. Fischman, Attorney for Intervening Plaintiffs.

Cravath, Swaine & Moore, Attorneys for Defendant (Ralph L. McAfee, George M. Billings, Edward C. Perkins, of Counsel).

Murphy, *D. J.*

This is a motion made by defendant, The Baltimore and Ohio Railroad Company, for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure, 28 U. S. C. A., dismissing the consolidated amended complaint. The motion is made upon the ground that the complaint, and all the claims alleged in it, are barred either by the New York statute of limitations of three years[1] or six years.[2] In the alternative, defendant moves for dismissal of all claims accruing prior to May 7, 1942, as barred in any event by the New York ten-year period of limitations.[3]

The complaint undertakes to state a claim in the nature of a representative class suit by former bondholders of the Alton Railroad Company (hereinafter called the Alton). The gist of the complaint is that, during the period January 7, 1931, through November 25, 1942, when defendant owned and controlled all the voting stock in the Alton, it so mismanaged the affairs of that railroad, while favoring its own interests, as to cause the Alton to become insolvent. Such mismanagement, it is alleged, made necessary a reorganization of the Alton, under Section 77 of the Bankruptcy Act, in which the Alton bondholders realized only $375 for each $1,000 principal amount of bonds. In the reorganization proceeding the claim on the Alton bonds was allowed in the full amount, so that plaintiffs assert that they are judgment creditors whose

1. N. Y. C. P. A. §49.

2. *Id.* §§47-a, 48(8).

3. *Id.* §53.

proven claim has been only partially satisfied. Plaintiffs apparently sue in the capacity of creditors in aid of execution on their debtor's claim against defendant; *viz.*, the Alton's claim for damages due to the alleged mismanagement during the period of defendant's control.

Jurisdiction is alleged on the ground of diversity of citizenship, defendant asserted to be a Maryland corporation, and plaintiffs to be citizens of states other than Maryland.

The complaint sets forth two separately stated claims with material allegations all stated in the first count which seeks damages due to alleged mismanagement of the Alton. The second count repeats the allegations of the first one and alleges that those facts also constituted a fraud upon the Alton and its creditors; that the action is one for fraud within the contemplation of the applicable internal time limitation of New York; and that plaintiffs did not discover the facts constituting such fraud until long after the commencement of certain reorganization proceeding. Defendant in its answer denies any wrongdoing or mismanagement with respect to the Alton and concedes that substantial issues of fact exist on this issue. Defendant's present motion is based entirely on the ground of time limitations and, for the purposes of deciding this motion, the factual allegations of the complaint must be taken as true.

Such allegations are of two sorts: (1) those relating to plaintiffs' rights as bondholders of the Alton; and (2) those relating to the alleged claim against the defendant.

(1) With respect to their rights as bondholders plaintiffs allege that they own bonds of the Alton which were secured by a mortgage constituting a first lien upon all of its assets. In April, 1941, the Alton defaulted in pay-

ment of interest on these bonds, and their entire principal amount then became due. On November 25, 1942, the Alton filed in the United States District Court for the Northern District of Illinois, and that court approved, a petition for reorganization under §77 of the Bankruptcy Act, with order enjoining commencement of suits against the Alton or seizure of or interference with its property. A claim, filed in the reorganization proceeding on behalf of all bondholders by a trustee representing them, was allowed for the full amount of the bonds. Application, made on behalf of creditors in the reorganization proceeding to require the Alton's trustee to prosecute a claim against defendant for alleged mismanagement, or to permit the bondholders to do so was denied, and the injunction already mentioned remained effective until termination of the reorganization proceeding. In May of 1947, a consummation order and final decree was entered in the reorganization proceeding canceling the mortgage securing the Alton bonds and voiding the bond certificates. The Alton bondholders received securities of the purchasing corporation claimed to have had a market value of about $375 for each $1,000 principal amount. In addition, they were permitted to retain the bond certificates perforated with a legend reciting that the subject bond had been canceled for all purposes " * * * except for purpose of evidencing right of the bearer or registered owner to a claim, if any, against The Baltimore and Ohio Railroad Company".

By reason of the foregoing, plaintiffs allege that they, and all other bondholders similarly situated, stand in the position of judgment creditors who have issued executions which have been satisfied to the extent of 37 cents on the dollar, and whose debtor, the Alton, has no other assets.

(2) With respect to their claim against defendant, plaintiffs allege that on January 7, 1931, defendant acquired

all the voting stock of the Alton, and thereafter elected all its officers and directors. These are claimed to have acted as defendant's servants and in accordance with its directions and policies. Defendant's control of the Alton continued until November 25, 1942, when the Alton went into reorganization. During the period of its control, defendant is charged with having diverted revenue-bearing traffic from the Alton's lines to its own, and revenue-bearing interchange traffic from railroads with which the Alton had profitable business relations to railroads with which defendant had profitable business relations, thereby enriching defendant and damaging the Alton and its bondholders in the amount of $17,500,000.

Plaintiffs claim that defendant during this period failed to keep the Alton's rolling stock in repair, stored it on open side tracks where it became valueless. As a result the rolling stock is asserted to have been damaged to the extent of $19,500,000, and the Alton said to have lost an additional $5,000,000 which it would have earned as profits from its use.

Defendant is further charged during this time to have used the Alton's tracks, equipment and facilities without paying for such use, and having caused the Alton to repair defendant's rolling stock free of charge. Resulting damage to the Alton is claimed to have been $1,000,000.

Defendant is also claimed at this time to have diverted purchases of company equipment and supplies from potential shippers over the Alton's lines to potential shippers over the defendant's lines, thereby enriching defendant and damaging the Alton and its bondholders in the amount of about $3,000,000.

Plaintiffs say also that defendant within the period of their control caused the Alton to negotiate new contracts with three designated companies upon terms less

favorable to the Alton and more favorable to defendant, thereby enriching defendant and damaging the Alton and its bondholders in the amount of about $1,000,000.

It is claimed that defendant filed income tax returns in respect of the Alton's operations and its own for the years 1940 and 1941 upon a consolidated basis. During those years the Alton suffered a net operating loss of about $2,000,000 which defendant charged against its own profits for those years. Such losses could have been set off against profits said to have been made by the Alton during 1942 and 1943, with a consequent income tax saving to the Alton. That saving was lost to the Alton. In addition defendant is said to have discriminated against the Alton in dividing revenues derived from traffic interchanged between them, retaining an excessive proportion during its control.

Finally, defendant is charged with having deprived the Alton, by all of the foregoing acts, of its opportunity to improve its competitive position, thereby preventing it from capitalizing on its opportunities and from earning substantial net returns; and with having practiced, by all the foregoing acts, a fraud upon the Alton and upon the Alton bondholders, including plaintiffs.

The complaint seeks appointment of a receiver, judgment against defendant in the amount of at least $28,343,753, payment of plaintiffs' expenses, and distribution of the balance among Alton's bondholders.

In respect of time limitations, the answer sets up the three, six and ten-year periods under New York statutes as well as the five-year period under the Illinois statute.

The common law conflict-of-laws rule regarded the ordinary statute of limitations as procedural and consequently required choice as governing law of the forum's

own period of limitation to the exclusion of any other.[4] The civil law of the continental courts has generally taken the contrary view that time limitations are substantive and accordingly require application of the period prescribed by the law of the place of the transaction rather than that of the forum. Some American cases have favored this view as more harmonious with factors significant for choice of governing law in a conflicts situation.[5] In New York the legislature early undertook to overrule the common law conflicts rule by adoption of a "borrowing" statute of limitations which made governing the internal period of limitation of the state of which the defendant was a resident at the time the action accrued.[6] Through a series of amendments,[7] this statute has evolved into its present form as a rule of alternate reference: for a cause of action which arises outside the forum either the time limitation of the forum or that of the state where the cause of action arose, is applicable in the case of non-resident plaintiffs, and only the time limitation of the forum in the case of resident plaintiffs. All plaintiffs must surmount the hurdle of the internal period of New York; non-resident plaintiffs must in addition surmount the hurdle of the period prescribed by the state where the cause of action arose. The *Erie* principle, controlling cases like the instant one where jurisdiction is based on diverse citizenship, requires application in this court of

4. Restatement, Conflict of Laws §§603, 604 (1934).

5. See *LeRoy* v. *Crowninshield*, C. C., D. Mass. 1820, 15 Fed. Cas. No. 8, 269, page 362, 2 Mason 151; *Davis* v. *Mills*, 194 U. S. 451 at 454.

6. Cf. *Miller* v. *Brenham*, 68 N. Y. 83 with N. Y. Code of Civil Procedure §390, effective May 1, 1877.

7. Code of Civil Procedure §390a, added by N. Y. Laws, 1902, c. 193; Civil Practice Act §13; N. Y. Laws 1943, c. 516.

this statutory conflicts rule of choice of law as a constitutional mandate.[8]

Plaintiffs consist of a Rhode Island corporation, individual citizens of California and Rhode Island, and five residents of New York. With respect to the New York residents, only the internal period of New York is applicable; for the others, the New York time-limitation, and, in addition, that of the state where the cause of action accrued, govern.

At the outset there are several problems: characterization of plaintiffs' claim; and determination whether or not under any applicable period of limitation the appropriately classified claim is barred. With respect to the second question, there are additional issues: when does the applicable time limitation begin to run; and which one of several varying periods governs. Each separate problem does not merely add to the number of possible resolutions; it multiplies them. When it is realized that no single answer to any question is urged by either side, the magnitude of the geometric progression of possible solutions is manifest. For example, defendant contends that the claim may be viewed in three different perspectives: (1) as one by the bondholders against the Alton itself, forming the basis for a creditor's bill in equity against defendant; (2) as a claim of the Alton against defendant which they, as creditors, pursue by way of such a creditor's bill; and (3) as a claim by plaintiffs directly against defendant for an injury done to their security as bondholders.

Moreover, under defendant's first classification, alternate statutes of limitations are alleged to apply: one of

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8. *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487; *Guaranty Trust Co.* v. *York*, 326 U. S. 99.

six years relating to actions on bonds secured by a mortgage on real estate,[9] or another of similiar duration governing actions upon contract obligations.[10] Under defendant's second qualification of the claim, it is urged that two additional periods of limitations in the alternative govern: the three year statute applicable to actions to recover damages for injury to property;[11] or a six year one for actions by a corporation against a former shareholder.[12] Defendant's third characterization would bar so much of the claim relating to acts prior to May 6, 1942, under still another limitation, the ten year equity statute.[13]

For their part plaintiffs insist that their claim is an "old-fashioned creditor's suit recognized by Courts of Equity almost from the beginning of equity jurisprudence." No statute of limitations, they argue, can begin to run until judgment on plaintiffs' claims in the bankruptcy proceeding on May 31, 1947, less than five years before commencement of the present action. Moreover, plaintiffs contend that no period of limitation shorter than six years is applicable, and actually the ten year equity statute running from 1947 is most appropriate.

The first major problem is the characterization, classification or qualification of plaintiffs' claim for purposes of time limitation. The juridical nature of plaintiffs' claim must be ascertained. Such characterization must be made under the *Erie* principle in accordance with the body of law in the conflicts area of the state in which this court sits. There is no indication that such classification

9. N. Y. C. P. A. §47-a.

10. *Id.* §48(1).

11. *Id.* §49(7).

12. *Id.* §48(8).

13. *Id.* §53.

varies between the body of law for conflict and that for internal purposes in New York. Accordingly, the qualification of plaintiffs' claim must proceed largely on decisional law in New York in non-conflict situations.

Two crucial questions are presented in the instant case: (I)-From what time does *any* applicable period of limitation begin to run—from the date of default by Alton on plaintiffs' bonds in April 1941, from the time when defendant ceased control of Alton in November, 1942, or from the day the final order in the bankruptcy proceedings was entered in May, 1947; (II) What period of limitations governs—a three, one of several six year periods, a ten or even a twenty year one. This question also involves consideration whether such period is tolled during the reorganization proceedings.

I

Viewing plaintiffs' claim as one asserted as an asset of their debtor, Alton, which they may be entitled to enforce in a creditor's action in aid of some execution only partially satisfied in the bankruptcy proceedings, the question presented is whether any period of limitation applicable begins to run from April, 1941, or November 25, 1942, at which times plaintiff's claim against Alton had clearly accrued, on one hand, or from May 31, 1947, when the final order in the bankruptcy proceedings was entered, on the other hand.

Two cases in point decided five years apart by the same court offer conflicting answers and require some detailed consideration. The first, Buttles v. Smith,[14] in 1939, was an action brought by a receiver, in February, 1938, as ancillary to sequestration proceedings on behalf of cred-

14. 281 N. Y. 226.

itors of an insolvent corporation. The receivership proceedings had been instituted by one Anness in aid of execution on a judgment entered in 1933 which in turn had arisen out of an obligation incurred in 1926. The basis of the action was a series of alleged wrongful transfers alleged to have taken place in 1927 and 1929.

The complaint stated three separate causes of action, each to set aside alleged fraudulent diversions of corporate funds and for an accounting from defendants of property received by them. The claims were all statutory, under (1) §15, New York Stock Corporation Law (prohibiting transfers in contemplation of insolvency and making participating officers and directors personally liable to creditors to the extent of their direct loss); (2) §274, New York Debtor and Creditor Law (declaring fraudulent transfers making working capital inadequate for a specific business or transaction, as to persons becoming creditors during such business or transaction); and (3) §60(5), New York General Corporation Law (giving to creditors a right of action to set aside transfers made, with knowledge of the transferee, in violation of any law).

As to all three causes of action, the court held that the claim was one for an accounting in equity and not at law for damages, since it was one by a creditor attempting to follow funds of the corporation into the hands of persons to whom illegally transferred, and that the ten-year statute of limitations applied to plaintiff's claim.

As to accrual of the causes of action, the court differentiated the first and third from the second, holding that the second accrued at the time of the wrongful transfers, more than ten years prior to the beginning of suit, and was accordingly barred. The other two causes of action, it ruled, accrued only when judgment had been obtained by Anness and execution had been returned unsatisfied.

Since this event was less than six years from the date of suit, it held those two causes of action not to be barred, either by the six-year or the ten-year statutes.

In the second case, Hastings v. H. M. Byllesby & Co., et al.,[15] suit was brought in 1939 by a special trustee in bankruptcy procedings to recover from defendant property of the debtor allegedly wasted or taken unlawfully from it, and to recover profits allegedly wrongfully appropriated. The complaint alleged that defendant Haystone conspired in June, 1925, to obtain large profits at the expense of the debtor corporation by means of transactions in which defendant received from the debtor valuable stock and large sums of money in exchange for property worth much less. These transactions took place in 1926. The debtor's petition in bankruptcy was filed in 1935.

The court affirmed the order of an intermediate appellate tribunal barring the action under the six-year statute of limitation running from March, 1926. The court distinguished the Buttles case on which plaintiff relied for his contention that the cause of action accrued upon his appointment as trustee in 1935, and not at the time of the alleged wrongful acts, in these terms:

> "The plaintiff relies heavily upon our decision in *Buttles* v. *Smith*, 281 N. Y. 226. In that case we held that no cause of action to set aside transfers of corporate property made in violation of section 15 of the Stock Corporation Law or of subdivision 5 of section 60 of the General Corporation Law accrues to a creditor until the creditor has obtained a judgment and execution has been returned unsatisfied. The Statute of Limitations, we there said, does not commence to run against such a cause of

15. 293 N. Y. 404.

action, asserted by a receiver appointed in a suit brought by a judgment creditor in aid of execution, until the cause of action accrues to the creditor. The gist of the creditor's cause of action, asserted in that case by a receiver appointed in an action brought by the judgment creditor for the sequestration of the property of a corporate debtor, was the illegal transfer of corporate assets which otherwise would have been available for the satisfaction of a judgment obtained by the creditor. No wrong is done by such a transfer to a creditor whose debt can be satisfied out of other assets of the debtor, and ordinarily a creditor may appeal to the courts to set aside an illegal transfer of the debtor only after he has obtained a judgment which he has been unable to enforce by execution. The wrong to the creditor by such a transfer of corporate assets is independent and distinct from any wrong to the corporate debtor, and in *Buttles* v. *Smith*, supra, the receiver, suing in behalf of a creditor, sought a remedy solely for the wrong done to the creditor. No wrong to the debtor was alleged in the complaint."[16]

Again with respect to plaintiff's claim "that here the trustee in bankruptcy is clothed with all the rights of a creditor with execution returned unsatisfied and is asserting in behalf of creditors a cause of action for the relief specified in subdivisions 1 and 2 of Section 60 [of the General Corporation Law], just as in *Buttles* v. *Smith* the receiver asserted a cause of action in behalf of a creditor for the relief specified in subdivision 5 of the same section, and that the same rules fixing the time when the cause of action accrues and the statutory limita-

16. 293 N. Y. at 410-411.

tion begins to run must be applied to all actions brought in behalf of a creditor or creditors pursuant to the provisions of sections 60 and 61 of the General Corporation Law", the court assumed *arguendo* that such was the case, but observed:

> "Even so the fact remains that the cause of action is based upon a wrong to the debtor. The cause of action accrued to the debtor when the wrong occurred and though the statute permits a creditor or stockholder to bring an action for the wrong done to the corporation, the damage or injury to a creditor, like the damage or injury to a stockholder, arises only indirectly from the damage or injury to the corporation and is repaired when the damage or injury to the corporation is repaired. That, as we have pointed out, was not true of the cause of action asserted in *Buttles* v. *Smith*, 281 N. Y. 226, *supra*, under a different subdivision of the same section of the statute. The reasons which in that case required the conclusion that the cause of action there asserted accrued when execution was returned unsatisfied do not apply here—or perhaps even point to a different conclusion."[17]

It may be seriously questioned whether in fact the Buttles case represents a "wrong to the creditor • • • independent and distinct from any wrong to the corporate debtor," in contradistinction to the claim in the Hastings case which "arises only indirectly from the damage or injury to the corporation and is repaired when the damage or injury to the corporation is repaired". Both claims may well have stood on the same ground so far as their derivative or independent nature is involved. If so, then the Hastings case may not be distinguishable but may

17. *Id.* at 411.

have overruled *pro tanto* the Buttles case. Yet if the varying result is explicable by comparative scrutiny of the precise language of the pleadings in the respective cases, and "no wrong to the debtor was alleged in the complaint" of the Buttles case, then that distinction controls in the instant situation. The language of this complaint indicates plaintiffs are asserting, not a claim of their own, but one which is an asset of their debtor Alton. For example, plaintiffs allege in paragraph 16 that they:

> "* * * are in the position of creditors who have secured judgment establishing their claims and have issued executions which have been satisfied to the extent of 37½ cents in respect of each dollar of principal amount and otherwise returned unsatisfied."

And in paragraph 17 they allege:

> "The claim asserted against the defendant in this action constitutes the only asset on which the unsatisfied claims of the holders of Alton Bonds may be satisfied."

Under either view of the Hastings case, whatever period of limitation is applicable to plaintiffs' claim, considered as a creditors' suit pursuing their debtor's assets, it must begin to run not later than November 25, 1942, the last possible date of accrual of any claim of the debtor against defendant.

If, however, it is possible to characterize plaintiffs' claim as one against the debtor corporation for a deficiency on the bonds, then it is clear that such claim accrued in April, 1941, the date of default.[18] Or should the claim be classi-

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18. N. Y. C. P. A. §47-a; *State of Rio de Janeiro* v. *Rollins & Sons*, 299 N. Y. 363.

fied as one directly against defendant for injury done to plaintiffs' security under the mortgage securing the bonds, then the date of accrual would again be no later than November 25, 1942.[19]

It does not seem likely that the instant suit is one based upon a final order or decree rendered in the bankruptcy proceedings by the federal district court in Illinois in May, 1947. Even though under such order plaintiffs' claims as bondholders were allowed in full, they were not merged into judgment for the amount of the deficiency. Were such the case, a 20 year period[20] running from date of such order would be applicable, something not urged by plaintiffs. So far from merging plaintiffs' claims as bondholders, the order preserved such claims for pursuit by plaintiffs against their debtor's asset with respect to defendant. So far as such order relates to the deficiency, no mandate or execution could issue thereon, and this is a consideration of controlling importance in determining that this is not a suit upon a judgment of another court.[21]

Another characterization, *viz.*, that of an "action to procure a judgment on the ground of fraud", would change the date of accrual "until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."[22] In the second count of their complaint, plaintiffs allege that the "acts and transactions complained of also constitute a fraud practiced by the defendant upon Alton and the holders of Alton Bonds,

19. N. Y. C. P. A. §§49(7), 48; *Schmidt* v. *Merchants Despatch Trans. Co.*, 270 N. Y. 287; *Pollack* v. *Warner Bro. Pictures, Inc.*, 266 App. Div. 118.

20. N. Y. C. P. A. §44.

21. See *Seaman* v. *Clarke*, 60 App. Div. 416.

22. N. Y. C. P. A. §48(5).

including the plaintiffs" and the "facts constituting said fraud were not discovered by the plaintiffs or any of them until long after the institution of the Reorganization Proceeding".

Such "allegations of the complaint" may well be "mere conclusions and even if accepted as allegations of fact they are only incidental to the cause of action brought against defendants on the ground that they have disregarded their duty to the corporation. Such allegations do not constitute a cause of action 'to procure a judgment on the ground of fraud' * * * under the provisions of section 48, subdivision 5, of the Civil Practice Act, * * * ".[23] Moreover, there is no indication that proof of the fraud which is merely alleged as such without more, would be essential to plaintiffs' right to recover,[24] or that the fraud thus alleged is merely constructive rather than in the nature of the common law action of deceit,[25] or that the circumstances were not "such as to suggest to a person of ordinary intelligence the probability that he had been defrauded" during the period of defendant's control of Alton.[26]

Accordingly, whatever period of limitation is governing, it does not appear to commence later than November 25, 1942, when defendant's control of Alton ceased.

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23. *Hastings* v. *H. M. Byllesby & Co. et al.*, 293 N. Y. 404 at 411-412.

24. *Laird* v. *United Shipyards*, 2 Cir., 165 F. 2d 12, cert. denied, 332 U. S. 842; *Saultz* v. *Manufacturers & Traders Trust Co.*, *id.*, 128 *id.* 889, cert. denied, 317 U. S. 674; *Pitcher* v. *Sutton*, 238 App. Div. 291, affirmed, 264 N. Y. 638.

25. *Austrian* v. *Williams*, 2 Cir., 198 F. 2d 697, cert. denied, 344 U. S. 909.

26. *Higgins* v. *Crouse*, 147 N. Y. 411 at 416; *Warner* v. *Republic Steel Corp.*, D. C. S. D. N. Y., 105 F. Supp. 998 at 1009.

II

The second question of what particular period is applicable involves also the consideration whether such period is tolled by the pendency of reorganization proceedings between 1942 and 1947. As the New York court observed, per Lehman, J., in *Schmidt* v. *Merchants Despatch Transp. Co.*,[27] "A single wrongful act which is asserted as the basis of recovery may constitute the breach of a number of obligations of diverse nature and origin. Then it may rest with the plaintiff whether he will assert as the basis of his right to damages the breach of one or more of such obligations; and the single right to recover such damages may then be alleged in different forms, each asserting as a basis of liability the breach of some duty or obligation. Each so-called 'separate and distinct cause of action' becomes in effect a 'count' in the allegation of a single wrong; and whether the statute [of limitations] bars recovery under any count depends upon the nature and origin of the liability asserted in that count."

The troublesome dilemma yet remains: whether a claim is barred if its "very gist and essence",[28] or its "real gravamen",[29] is beyond the longest period, or whether, on the other hand, every conceivable characterization of the claim must be barred.[30]

Suggestive analogies are urged by defendant for application of statutes running from November 25, 1942, providing a three-year period for waste or injury to property,[31] or six-year periods for damages based on con-

27. 270 N. Y. 287 at 299.

28. 270 N. Y. at 300.

29. *Corash* v. *Texas Co.*, 264 App. Div. 292.

30. See *Warner* v. *Republic Steel Corp.*, D. C. S. D. N. Y., 105 F. Supp. 998.

31. N. Y. C. P. A. §§48(8), 49(7); *Coane* v. *American Distilling Co.*, 298 N. Y. 197; *Gottfried* v. *Gottfried*, 269 App. Div. 292; *Corash* v. *Texas Co.*, 264 App. Div. 292; *Austin* v. *Gardner*, 267 App. Div. 865.

tract, injury to property or other common law liability.[32] Yet while claims might have been asserted under section 15 of the Stock Corporation Law or section 60(5) of the General Corporation Law, plaintiffs explicitly disclaim their applicability to the complaint. This has more than ordinary significance, since in *Battles* v. *Smith*,[33] relied upon by plaintiffs, it was to precisely such statutory actions that the six-year period of limitations was made to run only from the date of unsatisfied execution and not that of the original wrongful act. Assuming that available remedies at law cannot be patterned to embrace all the ramifications of the complaint, the ten-year equity statute would be applicable running from the time of the acts and transactions complained of.[34] This assumption is supported by the allegations of fraud, albeit constructive and presumably equitable, in the second count of the complaint.

Remaining is the matter of suspension of such ten-year period. We have already pointed out that the fraud allegation would not shift the commencement of running beyond November, 1942. Nor would the allegation that defendant dominated the Alton until November, 1942, have any different effect.[35] In a number of statutory provisions explicitly dealing with suspension,[36] only one appears in point, *viz.*, "Where the commencement of an

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32. N. Y. C. P. A. §48(1), (7) and (8). See *Potter* v. *Walker*, 276 N. Y. 15; *Dunlop Sons Inc.* v. *Spurr*, 285 N. Y. 333.

33. *Supra* note 15.

34. N. Y. C. P. A. §53.

35. *Pollack* v. *Warner Bros. Pictures, Inc.*, 266 App. Div. 118; *Austrian* v. *Williams*, 2 Cir., 198 F. 2d 697, cert. denied, 344 U. S. 909.

36. N. Y. C. P. A. §17 to 27.

action has been stayed by injunction or other order of a court or judge."[37] The terms of the restraining order, entered by the district court in the reorganization proceedings, alleged in paragraph 8 of the complaint, enjoins interference with "assets * * * choses in action * * * belonging to, or in the possession of the Debtor, * * * or from continuing any pending suits against the Debtor, or from bringing any new suits or proceedings against the Debtor on causes of action accruing prior to this date in or before any Court * * *."

The instant claim although asserting "causes of action accruing prior to" the date of the order, is not one "against the debtor," and consequently outside the ambit of such order. It is questionable whether assertion of the present claim by plaintiffs against the defendant herein during pendency of the reorganization proceedings would have amounted to interference with "assets" or "choses in action" of Alton within the contemplation of the order. But if it did, it is clear that "the commencement of an action" identical with the instant claim by either the Alton or its trustee was not enjoined. It is clear that it is the enforceability of the right sued upon, and not the party asserting such right, which determines the period during which the statute of limitations continues to run.[38]

The instant suit was commenced on May 7, 1952. Accordingly, that part of plaintiffs' claim based upon acts and transactions which occurred more than ten years before the date of commencement of this action are barred.

Motion for summary judgment granted in part.

Judgment accordingly.

Dated, New York, N. Y., June 30, 1954.

THOS. F. MURPHY,
U. S. D. J.

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37. *Id.* §24.

38. See *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242 at 251; *Peters* v. *Delaplaine*, 49 N. Y. 362, at 368; *Cooley* v. *Lobdell*, 153 N. Y. 596, at 602-603; *Mason* v. *Henry*, 152 N. Y. 529; *Hastings* v. *H. M. Byllesby & Co. et al.*, 293 N. Y. 404.

Opinion of United States Court of Appeals in *Rieser* Case

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13, October Term, 1955.

(Argued October 11, 12, 1955

Decided December 2, 1955.)

Docket No. 23560

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Plaintiffs-Appellants.

AND

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Plaintiffs-Appellants,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Southern District of New York, entered by Judge Murphy. Affirmed.

LOUIS BOEHM AND NATHAN B. KOGAN (Victor House, Abraham K. Weber, and Spencer Pinkham, of counsel) *for appellants.*

ABRAHAM K. WEBER *for Kathryn P. Braithwaite and Edward F. Quirke.*

LOUIS H. O. FISCHMAN *for intervening appellants.*

CRAVATH, SWAINE & MOORE (Ralph L. McAfee, George M. Billings and Edward C. Perkins, of counsel) for appellee.

FRANK, Circuit Judge:

The facts are fully stated in Judge Murphy's opinion, 123 F. Supp. 44.

1. In their brief filed in this court, plaintiffs say that their suit is but an "old-fashioned creditors' bill" by "creditors of a corporate principal debtor against its sole stockholder for violation of its fiduciary duties as such stockholder," and that this suit, substantively, rests on no New York statute. If, then, the basis of the plaintiffs' suit is non-statutory, we need not consider two cases, much discussed by the parties, *Buttles* v. *Smith*, 281 N. Y. 226, and *Hastings* v. *Byllesby*, 293 N. Y. 404, as both those cases involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes.[1]

2. A judgment-creditor, with execution returned unsatisfied, may, without relying on a statute, by an "old-fashioned" creditors' bill, have an equitable levy on an available asset of his debtor. The asset may consist of a

1. Assuming, *arguendo*, that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles*, and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case.

claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.

However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied.[1a] The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.

Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor.[1b] Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.

True, while it remained under the domination of B & O, its sole stockholder, Alton, in practical terms, as virtually B & O's slave, could not have brought suit against B & O. But, under the New York statute of limitations as construed by the New York courts, the period of that domination did not suspend the running of the statute. See *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2); *Laird* v. *United Shipyards*, 163 F. (2d) 12 (C. A. 2).[2]

1a. We assume, *arguendo*, that conceivably there might be facts (other than those here) giving rise to such an independent cause of action, even in the absence of a statute, which the creditors could not pursue until they obtained a judgment and execution thereon was returned unsatisfied.

1b. Cf. *Henderson* v. *Blakley Coal Co.*, 74 F. (2d) 567 (C. A. 2); *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2).

2. This interpretation, out of line with the interpretation of similar statutes in many other jurisdictions, seems harsh and inequitable. But, of course, we must abide by what the New York courts say its statutes mean.

3. Since plaintiffs do not allege any fraudulent conveyance, the New York Debtor and Creditor Law—which dispenses with a judgment in such circumstances—does not apply. Therefore a suit of this kind, an old-fashioned creditor's suit, could not be maintained until plaintiffs had the equivalent of a judgment against Alton and an unsatisfied execution. Plaintiffs maintain, and we shall assume, that they first occupied that position on May 31, 1947, when the Alton bankruptcy proceedings terminated.[3] The statute of limitations, Section 53 of the New York Civil Practice Act, applicable to such an equitable action, fixes a ten-year period within which suit must be brought; and this suit began on May 7, 1952, within that ten-year period.

These facts, however, do not help plaintiffs. We shall assume that, within the ten years ending May 31, 1957, plaintiffs, by their suit, could levy an equitable execution on any of Alton's available assets, which the final decree in the Alton bankruptcy proceedings permitted plaintiffs to pursue. But, to succeed, plaintiffs must show that those assets on which they seek thus to levy—*i.e.*, Alton's claims against B & O—were available when the suit began in 1952. They were not then available, because, before 1952, the statute of limitations had run with respect to those claims.[4] For the pertinent period of limitations is either (a) three years, under the New York Civil Practice Act,

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3. That is, they obtained equivalent of a judgment on the allowance of their bondholder claims in the Alton bankruptcy proceedings; and the termination of those proceedings on May 31, 1947, with part of the amounts due thereon unpaid, was the equivalent of a return of execution unsatisfied.

4. Our reasoning here differs from that of the district judge. But, in affirming a judgment, of course we may do so for reasons other than those of the court below.

Section 49 subdivision 7,[5] or (b) six years, under Section 48 subdivisions (1) or (8).[6]

In short, making assumptions most generous to plaintiffs, suit on the claims against B & O were barred on November 25, 1948, *i.e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942.

4. To be sure, the trustee was discharged on May 31, 1947. We shall assume that—thanks to the provision of the final decree in the Alton bankruptcy proceedings which gave the bondholders the right to pursue the claims, if any, against B & O—plaintiffs succeeded to Alton's right to sue B & O which had never been availed of by Alton's trustee. If so, on the most generous assumptions, plaintiffs' suit would not have been barred until November 25, 1948. But plaintiffs did not start suit until 1952.

We cannot accept plaintiffs' contention that the statute commences to run anew when a claim passes to an assignee of, or a successor to, one who could have sued thereon.[7] An assignment, whether or not by "operation of law," has no such resurrective or phoenix-like potency.[7] Nor, since

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5. Section 49 subdivision 7 includes "an action to recover damages for an injury to property. * * *"

6. Section 48 subdivision 1 includes an action upon a contract, express or implied, except a judgment and other exceptions not here relevant.

Section 48 subdivision 8 includes derivative actions against present and former directors, officers and stockholders for an accounting, for fraud, or to recover penalties or forfeitures imposed by statute or common law, but specifically excludes actions for waste or injury to property or for an accounting in connection therewith. For these latter actions, reference is made to Section 49 subdivision 7.

7. *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242, 251; *Cooley* v. *Lobdell*, 153 N. Y. 596, 602-603.

Section 14 of the New York Civil Practice Act makes a specific exception of an action by a principal against his agent, an exception not relevant here.

Alton's trustee in bankruptcy could have asserted these claims, did the pendency of the bankruptcy proceedings toll the statute, since 11 U. S. C. Section 205(b)—which provides that "the running of all statutes of limitations shall be suspended"—has no application to a suit by a bankruptcy trustee. We think 11 U. S. C. Section 29(e) is applicable to railroad reorganization proceedings and carries the only suspension of statutes of limitation running against claims belonging to the debtor's estate.

5. The New York Civil Practice Act, Section 48(5) provides a six-year period of limitations as to actions for fraud, a period which begins to run only from the discovery of the fraud. Plaintiffs, however, do not allege Alton was a victim of the kind of fraud covered by that section as construed in the New York decisions. See *Austrian* v. *Williams*, *supra*; *Laird* v. *Shipyards*, *supra*, and New York decisions there cited.[8]

Affirmed.

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8. Even if that statute applied to the fraud here alleged, nevertheless the action would fail. For the discovery—of whatever fraud had been practiced by B & O—occurred on November 25, 1942, the date of the appointment of Alton's bankruptcy trustee.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty eighth day of April, one thousand nine hundred and fifty nine.

Present:

HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges

HON. WILLIAM C. MATHES,
District Judge

MILTON S. KOBLITZ,
Plaintiff-Appellant

v.

THE BALTIMORE & OHIO RAILROAD CO.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk